Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2000

HELEN A. DICK,

Petitioner,

v.

COMMERCE BANCSHARES, INC.,
CBI-ILLINOIS, INC., and
PEOPLES MID-ILLINOIS CORPORATION,

Respondents.

Petition for a Writ of Certiorari
to the Appellate Court of Illinois, Fourth District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Was the petitioner denied due process (e.g., by the Illinois appellate court) because a holding company's agent (a trustee bank, acting in conflict with said bank's interest in higher trust management fees) used its 1982 pleading to fraudulently conceal the fact that a cause of action existed on which said bank could not sue, namely, an action against its "parent" company (Peoples Mid-Illinois Corporation, formed in 1971 as a one-bank holding company) for replacement of the 4,560 George F. Dick, Jr. and Althea M. Dick shares of the Capital Stock of the Peoples Bank of Bloomington which said holding company had converted, in mid-1972, to its own use and beneficial enjoyment?

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ORDERS BELOW

The order sought to be reviewed was entered by the Illinois appellate court on June 14, 1999 and is unpublished (under Illinois supreme court Rule 23). Said order begins at page 2 of the Appendix.

The Illinois supreme court's order (denying leave to appeal) was entered October 6, 1999 and is at page 1 of the Appendix. On October 18, 1999, plaintiff filed and served an affidavit of intent (to apply to the U.S. Supreme Court for a writ of certiorari) pursuant to Illinois supreme court Rule 368 (c).

BASIS FOR JURISDICTION IN THIS COURT

The order sought to be reviewed was entered by the Illinois appellate court on June 14, 1999 (App. 2). The aforesaid Illinois supreme court's order, denying leave to appeal, was entered October 6, 1999 (App. 1).

This petition is timely filed within 90 days after entry of the order denying discretionary review.

The jurisdiction of this Court is invoked under 28 USC § 1257 (a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

PERTINENT TEXT OF ILLINOIS STATUTES CITED

735 ILCS 5/13-215. Fraudulent Concealment.

"If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards."

At 810 ILCS 5/8-404 (Smith-Hurd 1993), Uniform Commercial Code Comment, para. 2, at p. 259, reads as follows:

"2. The registered owner's right to receive a new security where the issuer has wrongfully registered a transfer is established, but the cases have also recognized his right to elect between an equitable action to compel issue of a new security and an action for damages. [Citation omitted.] Such election of remedies is no longer available. The true owner of a certificated security is now required to take a new security except where an overissue would result and a similar security is not reasonably available for purchase. See Section 8-104. The true owner of an uncertificated security is entitled and required to take restoration of the records to their proper state, with a similar exception for overissue."

STATEMENT OF THE CASE

Because paraphrasing could not precisely show the facts and principles of law pleaded by plaintiff, the following numbered paragraphs are quoted from her complaint (App. 22). Fact pleading, in contrast to notice pleading, is required in Illinois. Adkins v. Sarah Bush Lincoln Health Ctr., 129 Ill.2d 497, 518 (1989). Whenever the granting of a motion to dismiss is reviewed, all well-pleaded facts alleged in the complaint are to be taken as true. Wheeler v. Caterpillar Tractor, 108 Ill.2d 502, 505-506 (1985).

I.

Background

"7. George F. Dick, Jr. was an attorney who died May 8, 1955, leaving a will dated July 14, 1953 * * *. His heirs, devisees and legatees were his wife (Althea M. Dick); their three natural children (Helen [who had no middle name or initial], Eleanor, and George F. Dick III, all of whom died in 1992); and Helen Althea Dick (hereinafter "Helen A," the plaintiff). Said Helen A. Dick was Eleanor's only child, was born during Eleanor's first marriage, was raised by her said maternal grandparents, and was adopted by them in 1935, when she was three years old. A copy of said will of George F. Dick, Jr. is attached hereto as Exhibit 'A.'

8. George F. Dick, Jr.'s said will [App. 36] gave said Althea M. Dick 'full possession and sole management' of all her late husband's property 'for as long as she shall live,' with the right to sell any or all of the property for her own purposes and to consume proceeds of any such sale without having to first exhaust her own assets. Althea accepted all benefits of her

late husband's will, which included the following provisions:

> 'No interest under this Will shall be transferable or assignable by any beneficiary (except by the Wills of Helen Dick and Helen A. Dick as provided above) or subject to the claims of their creditors ***.'

9. Transfers of interest which are prohibited by a spendthrift provision of a will are void. McKeown v. Pridmore, 310 Ill.App. 634, 645-[647] (lst Dist. 1941).

10. Althea M. Dick and George F. Dick III were named and served as Co-Executors of said will of George F. Dick, Jr.

* * *

13. The law does not permit a beneficiary in a will to accept that which benefits him and reject that which operates to his prejudice. Oglesby v. Springfield Marine Bank, 395 Ill. 37, 45 (1946).

14. Having accepted all benefits of George Jr.'s said will, Althea could not transfer any interest in stock shares (including but not limited to shares which she owned individually) except according to the terms and provisions of her late husband's will, including the aforesaid trust f/b/o the three daughters. Oglesby, at 45.

15. In a related case (McLean County 82-CH-124), the court found (Order entered March 2, 1984) that 'any assignment of interest in shares by Althea Dick prior to her death was violative of the limiting provisions of the Will of George F. Dick, Jr.,' a finding which is in keeping with Oglesby.

16. Upon the date of his death in 1955, George F. Dick, Jr. owned 91 of the total of

2,000 issued and outstanding shares of the Capital Stock of the Peoples Bank of Bloomington and Althea M. Dick (individually) owned 58 of said 2,000 shares. Althea (individually) purchased an additional 3 shares on or about March 27, 1959.

17. On or about September 19, 1955, the aforesaid 91 shares became registered (in the Bank's Stock Holders Ledger and on stock certificates representing, respectively, 80 and 11 shares) as follows:

> 'Althea M. Dick, Life Tenant Under Will of Geo. F. Dick, Jr., Deceased.'

18. Notice of a will gives a corporation, when asked to transfer shares of its stock, the duty to inquire into said will and the duty to refuse to effect any transfer, payment and/or delivery of shares (and any subsequent transfer, payment and/or delivery of shares) that is violative of the terms and provisions of said will. Seymour v. National Biscuit Co., 107 F.2d 58, 62 (3d Cir. 1939). Daily v. Universal Oil Products Co., 76 F.Supp. 349, 371 (N.D. Ill. 1947).

* * *

20. In 1967, said George III was both President of the Bank and Chairman of its Board of Directors. * * * Effective August 1, 1967, the Capital Stock Account was increased from $200,000.00 to $600,000.00; the total number of shares was increased from 2,000 to 60,000; and the par value was reduced from $100.00 per share to $10.00 per share.

21. Peoples Mid-Illinois Corporation, a Delaware corporation, was incorporated May 17, 1971 as a corporation authorized to issue

exactly 60,000 shares of capital stock of the par value of $10.00 each.

22. From in or about January 1972 (if not before) until his death in 1992, the aforesaid George F. Dick III was always a director of said holding company (Peoples Mid-Illinois Corporation and/or chairman of its board of directors.

23. During the period June 30, 1972 through July 3, 1972, all shares of the Capital Stock of the Peoples Bank of Bloomington (including all 2,730 shares which were property of the estate of George F. Dick, Jr. and all 1,830 shares which were Althea's individual property) and [emphasis added] the Bank's aforesaid Stock Holders' Ledger were converted by said Peoples Mid-Illinois Corporation to its own use and beneficial enjoyment. Copies of eight pages of said Stock Holders Ledger are attached hereto as Exhibit 'B.' Each page having any entry for the year 1972 bears the following words:

'PBB SHARES CONVERTED TO
PEOPLES MID-ILLINOIS CORP.'

[Said ledger pages are at App. 42-49 and show, among other things, that Peoples Mid-Illinois Corporation used said ledger as its own ledger beginning in mid-1972.

Said Peoples Mid-Illinois Corporation had only the title of a converter of the Capital Stock of the Peoples Bank of Bloomington; any successor holding company succeeded only to the non-existent ownership rights of said Peoples Mid-Illinois Corporation. Garner v. Pearson, 545 F. Supp. 549, 563-565 (1982).]

24. Althea died October 10, 1976, at which time said George III became testamentary trustee of the aforesaid George F.

Dick, Jr. testamentary trust * * *.

25. On or about December 26, 1978, Peoples Bank of Bloomington began acting as successor trustee of the aforesaid George F. Dick, Jr. trust f/b/o the three daughters (including Helen A. Dick) and trustee of trusts (f/b/o Helen A. Dick et al.) set forth in the aforesaid 1969 will of Althea M. Dick.

* * * * *

29. On or about September 22, 1982, Peoples Bank of Bloomington (sole subsidiary of the aforesaid Peoples Mid-Illinois Corporation) filed a seven-count pleading [App. 53] as to the estates of George F. Dick, Jr. and Althea M. Dick (McLean County 82-CH-124). Said trustee Bank did not name said holding company as a party to any count. Counts V and VII were dismissed by the court on January 18, 1983. The Bank voluntarily dismissed its Count VI (a count for discovery from Helen A. Dick and others) on February 15, 1984. The plaintiff Bank and defendant George F. Dick III were the only parties to the only counts (i.e., Counts I, II, III and IV) then remaining.

[The Bank's said 1982 pleading (App. 53) was an action for will construction.]

30. On March 2, 1984, Circuit Judge Richard M. Baner entered a partial summary judgment order. He found, among other things, that 'any assignment of interest in shares by Althea Dick prior to her death was violative of the limiting provisions of the Will of George F. Dick, Jr.'; that defenses of res judicata, estoppel, laches and/or limitations had not been

established; and that an accounting was to be submitted as to all shares for the period March 31, 1959 to the October 10, 1976 date of Althea's death. [Emphasis added.]

31. Said findings were against the interests of holding company director George F. Dick III, and also against the interests of his privy, Peoples Mid-Illinois Corporation. Collateral estoppel applies against George III's privy, Peoples Mid-Illinois Corporation, and its successor holding company (or companies). Housing Authority v. YMCA, 101 Ill.2d 246, 252 (1984).

[As set forth at paragraph 3 of the agreed statement of facts (App. 16), referred to by the appellate court (at App. 6) in the order sought to be reviewed: during July 15, 1998 proceedings in the instant case, Helen A. described this as "an action to recover shares of the Capital Stock of the Peoples Bank of Bloomington held in a constructive trust imposed [by Judge Richard M. Baner's Order] on March 2, 1984."

Exhibits to "Plaintiff's Response (Vol. II, C-428) to Defendants' Memorandum" are Judge Baner's February 21, 1984 order (App. 67) as to Helen A.'s lack of standing in the Bank's action; Judge Baner's aforesaid March 2, 1984 order (App. 68); his March 14, 1984 Record Sheet entry (App. 71) and his March 14, 1984 order (App. 73) permitting dismissal per "Stipulation" (App. 72) between the Bank and George III.]

32. Before any accounting was submitted, the Bank and George III entered a settlement agreement as to George III's (individual) liability and the case was dismissed (over the objection of Helen A. Dick) per stipulation between the Bank and George III on

March 14, 1984. Neither of the parties (i.e., the Bank and George III) appealed the orders entered in the Bank's 1982-1984 action."

[The aforesaid March 2, 1984 order, imposing a constructive trust on all shares, was not a complete remedy. All shares and benefits therefrom are, to date, in the possession of a holding company.]

II.

Plaintiff Raised the Issue of Due Process in Her Complaint.

The federal issue of due process (including fraudulent concealment of this cause of action/remedy by Peoples Mid-Illinois Corporation's agent) was raised in plaintiff's complaint (App. 22) and her affidavit incorporated at paragraph 1 of said complaint.

> "1. As shown by principles of law and facts set forth with particularity hereinbelow (and in the affidavit of Helen A. Dick attached hereto as Exhibit 'C' and incorporated herein), this action is not barred by laches, limitations, estoppel or res judicata. Collateral estoppel applies against the defendants. This cause of action/remedy was fraudulently concealed from plaintiff and she did not know or discover until on or about March 16, 1998 that a cause of action existed against the holding company for replacement of shares of the Capital Stock of the Peoples Bank of Bloomington and recovery of dividends declared, with interest. 18 C.J.S. Corporations, § 281 [1990].

[An election of remedies (i.e., a choice between replacement of shares or damages) is not available. Investment Securities Act, 810 ILCS 5/8-404 (Smith-Hurd 1993), Uniform Commercial Code Comment, paragraph 2, p. 259.]

* * *

3. As set forth in beneficiary Helen A. Dick's aforesaid affidavit (Exhibit 'C'), the trustee Bank has never disclosed said remedy to her.

* * *

26. The trust relation between the Bank and beneficiary Helen A. Dick has not ended.

27. The principle of caveat emptor does not apply to fiduciary relationships. The trustee must not only be truthful in all his representations, he must not remain silent concerning any matter that would throw light on the trust estate. 90 C.J.S. Trusts § 247, p. 240. The beneficiaries must not only have been acquainted with the facts, they must know of their rights and have been apprised of the law, and of how the facts would be dealt with by a court of equity. 76 Am Jur 2d Trusts, § 357, p. 359. A trustee's failure to disclose amounts to fraudulent concealment. Chicago Park District v. Kenroy, 78 Ill.2d 555, 562 (1980).

28. The dominant characteristic of a holding company is the ownership of securities by which it is possible to control or substantially influence the policies and management of one or more operating companies in a particular enterprise. North American Co. v. Securities & Exchange Commission, 327 U.S. 686, 701 (1946).

29. On or about September 22, 1982, Peoples Bank of Bloomington (sole subsidiary of the aforesaid Peoples Mid-Illinois Corporation) filed a seven-count pleading as to the estates of George F. Dick, Jr. and Althea M. Dick (McLean County 82-CH-124). Said trustee Bank did not name said holding company as a

party to any count. Counts V and VII were dismissed by the court on January 18, 1983. The Bank voluntarily dismissed its Count VI (a count for discovery from Helen A. Dick and others) on February 15, 1984. The plaintiff Bank and defendant George F. Dick III were the only parties to the only counts (i.e., Counts I, II, III and IV) then remaining.

* * *

34. The Bank's said 1982 complaint concealed and/or failed to disclose the existence of any cause of action against said holding company. As set forth in the Affidavit of beneficiary Helen A. Dick (Exhibit 'C' attached above), the trustee Bank has never told her that there was any cause of action against the holding company and has never told her that the Bank could not sue its parent company.

[The Bank's said 1982 pleading (App. 53) is an exhibit in the instant case. The signature page (at App. 66) shows that said pleading was filed by Samuels, Miller, Schroeder, Jackson & Sly of Decatur, Illinois.

The same attorneys openly represented Peoples Mid-Illinois Corporation in cases the appellate court refers to as Dick IV and Dick V: Dick v. Peoples Mid-Illinois Corp., 195 Ill.App.3d 654, 655 (1990), appeal after remand, 242 Ill.App.3d 297, 298 (1993).

The Stipulation as to Agreed Statement of Facts (App. 16) shows, at the first paragraph, that said same attorneys represent all defendants (including said Peoples Mid-Illinois Corporation) in the instant case.]

At all times material hereto, Peoples Mid-Illinois Corporation and its successor (successors) have known of the aforesaid concealment; have known of Judge Baner's aforesaid 1984 orders; and have known

that the spendthrift provision of George Jr.'s will (App. 36) would prevent Helen A. from entering a contingency fee agreement. McKeown v. Pridmore, 310 Ill.App. 634, 645-647 (lst Dist. 1941).]

35. At all times material hereto, Peoples Mid-Illinois Corporation and its successor holding company (or companies) have known of the existence of this cause of action and have known of (among other things) 1982 et seq. litigation as to the estates of George F. Dick, Jr. and Althea M. Dick in which its subsidiary (the Bank) was participating as a trustee. Peoples Mid-Illinois Corporation and its successor holding company (or companies) have known and/or approved of the aforesaid concealment/failure to disclose.

36. Where a third person is in privity with or [emphasis added] occupies an agency relationship with the defendant, then the defendant's knowledge or approval of the third person's concealment is sufficient to bar/toll a limitation period. Chicago Park District v. Kenroy, 78 Ill.2d 555, 563 (1980).

[Liability (including punitive damages) may be imposed upon a successor corporation for the conduct of its predecessor if there has been a merger or consolidation. 19 C.J.S. Corporations, § 810 (c) (1990).]

37. As set forth in the aforesaid Affidavit of Helen A. Dick (Exhibit 'C'), she was defrauded by the Bank's aforesaid 1972 pleading. She did not know or discover until on or about March 16, 1998, that the Bank could not have sued its parent company and that the remedy for the aforesaid 1972 conversion was

and is an action against the holding company for replacement of shares of the Capital Stock of the Peoples Bank of Bloomington.

38. An action that has been fraudulently concealed may be commenced at any time within 5 years of discovery of said action. 735 ILCS 5/13-215."

III.

Plaintiff Argued the Issue of Due Process in the Trial Court.

Plaintiff argued said issue at pages 2-3 of "Plaintiff's Written Opposition [Vol. I, C-57] to Defendants' Combined Motion to Dismiss Complaint":

"Collateral Estoppel Cannot Apply Against Plaintiff Due to the Lack of Privity Between the Trustee Bank and Helen A. Dick.

If there is no identity of interest, and certainly if the interests of the two parties are in conflict, privity does not exist. 50 C.J.S. Judgment § 830 at 394-395 (1997). Actual or potential conflicts of interest in the previous litigation will negate the necessary element of adequate representation to establish privity. 50 C.J.S. Judgment § 830 at 396 (1997).

From the time the Bank became trustee in December 1978 (paragraph 25 of the complaint), through its 1982-1984 action against George F. Dick III (McLean County 82-CH-124) and ever since, said trustee Bank has been (as set forth in paragraphs 1-3, 25-27, 29, and 34-38 of the complaint and paragraphs 1-4 of plaintiff's affidavit, Exhibit 'C' to the complaint) acting in privity with Peoples Mid-Illinois Corporation by fraudulently concealing material matters from Helen A. Dick (e.g., the existence of this cause of action against said

holding company for replacement of shares of the Capital Stock of the Peoples Bank of Bloomington, and the fact that the subsidiary bank could not sue its parent company).

The trustee Bank could not and was not adequately and/or fully representing Helen A. Dick's interests and was not her privy. She thus is not bound by any issue that may have been decided against her interests in the Bank's aforesaid 1982-1984 action.

Under both the Federal and Illinois Constitutions, the due process clause requires "at a minimum, that a party have a full and fair opportunity to litigate an issue before he is bound by that issue's resolution." CIPS v. Allianz Underwriters, 158 Ill.2d 218, 225 (1994). Due process requires an opportunity to be heard at a meaningful time and in a meaningful manner. U.S. Const. Amend. 14. Logan v. Zimmerman Brush Co., 455 U.S. 422, [437], 71 L.Ed.2d 265 (1982)."

IV.

Plaintiff Also Argued the Issue of Due Process in the Appellate Court.

In her opening brief in the appellate court, plaintiff's argument as to due process was:

"PLAINTIFF HAS BEEN DENIED DUE PROCESS.

Due process requires an opportunity to be heard at a meaningful time and in a meaningful manner. U.S. Const. Amend. 14. Logan v. Zimmerman Brush Co., 455 U.S. 422, [437], 71 L.Ed.2d 265, 279 (1982).

Under both the Federal and Illinois Constitutions, the due process clause requires 'at a minimum, that a party have a full and fair

opportunity to litigate an issue before he is bound by that issue's resolution.' CIPS v. Allianz Underwriters, 158 Ill.2d 218, 225 (1994).

Fact pleading, in contrast to notice pleading, is required in Illinois. Adkins v. Sarah Bush Lincoln Health Ctr., 129 Ill.2d 497, 518 (1989). The issue of due process was raised by facts set forth at paragraphs 1, 2, 3, 27-29 and 34-38 of plaintiff's complaint * * *.

Due to the aforesaid concealment of material matters, which Helen A. did not discover until 1998, she has not yet had an opportunity to be heard (at a meaningful time and in a meaningful manner) as to this cause of action.

Plaintiff hereby incorporates by reference her argument set forth in Section I above.

[Said Section I was entitled: 'Material Matters Plaintiff Needed to Know, in Order to Litigate this Cause of Action/Remedy, Were Fraudulently Concealed from Her by the Trustee Bank Under Circumstances Indicating that Said Bank was Doing so as Agent for its 'Parent' Holding Company (or Companies)."]

Peoples Mid-Illinois Corporation and its successor holding company or companies have been unjustly enriched. Fairness and justice require that plaintiff have an opportunity to litigate this cause of action/remedy, now that she has discovered the aforesaid material matters which she did not know prior to March and September 1998."

V.
The Rulings Below

A.

The trial court did not specifically address the issue of due process. Its orders are at App. 19 and 20.

B.

In the order sought to be reviewed, the appellate court stated (at App. 2):

> "* * * Plaintiff's issues are whether (1) the alleged fraudulent concealment of the cause of action prevents the application of principles of res judicata or collateral estoppel; (2) her right to due process had been violated; and (3) the award of sanctions amounted to an abuse of discretion."

The appellate court also stated (at App. 11):

> "Plaintiff argues she has been denied due process because she has not been given an opportunity to be heard on the alleged cause of action. We interpret plaintiff's argument as requesting that the fundamental fairness exception to the doctrine of res judicata be applied to this case. However, no objective factor has impeded plaintiff's opportunity to raise the claim. The 'fraudulent concealment' alleged in the complaint is no more than a conclusory statement that she did not know until March 16, 1998, that she had a cause of action against the holding company for replacement of shares and recovery of dividends and interest.
>
> In an affidavit attached to the complaint, plaintiff stated that Peoples Bank, as trustee, 'never revealed to me that the Bank

could not sue its parent company and has never revealed to me the existence of any cause of action against the holding company.' The affidavit further states that, until March 16, 1998, she did not know Peoples Bank could not sue its parent holding company and that a cause of action existed against the holding company for the replacement of the shares. * * *"

Speaking further (at App. 12) as to fraudulent concealment, the appellate court referred to plaintiff's written response filed October 29, 1998 (Vol. III, C-647), and to the Stipulation as to Agreed Statement of Facts, which reads (at App. 17), in pertinent part:

" 5. [During t]he October 29, 1998 proceedings * * * [the court said] it had glanced through the document she had filed that day and did not see any fraudulent concealment."

The appellate court stated (at App. 12-13):

"We have also reviewed the document and agree with the trial court. * * *

The doctrine of res judicata bars this action. Plaintiff's complaint was properly dismissed. * * *."

Both trial and appellate courts apparently ignored the first paragraph of the aforesaid document filed October 29, 1998 (Vol. III, C-647), which reads:

"Plaintiff hereby incorporates by reference [emphasis added] her Complaint (filed April 22, 1998) and her 'Motion for Rehearing and Reconsideration' (filed October 21, 1998)---together with the Exhibits thereto, including uncontroverted Affidavits (designated, respectively, as Exhibits 'C' and 'J'.)"

C.

Said complaint and affidavits, thus incorporated by reference, clearly show fraudulent concealment:

(1)

Facts and principles of law showing fraudulent concealment are quoted from said complaint (App. 22) within Section II hereinabove. Said facts and principles of law include those showing that the trustee Bank, acting as Peoples Mid-Illinois Corporation's agent, fraudulently concealed the existence of any cause of action against said Peoples Mid-Illinois Corporation. An action for replacement of shares of the Capital Stock of the Peoples Bank of Bloomington would have yielded higher trust income. Peoples Mid-Illinois Corporation thus was causing said trustee Bank to work against said Bank's (individual) interests in the highest possible trust management fees.

(2)

In the aforesaid Exhibit "C" (App. 50), plaintiff deposed:

> "1. Throughout the Bank's action against George F. Dick III (McLean County 82-CH-124), the Bank was suing in its capacity of record as trustee. I trusted and relied upon the Bank and believed that the Bank (as my trustee) was revealing all causes of action and/or remedies to me. I also believed that the Bank was suing on all causes of action that existed as to property of the estates of George F. Dick, Jr. and Althea M. Dick.
>
> 2. The Bank (my trustee) has never revealed to me that the Bank could not sue its parent company and has never revealed to me the existence of any cause of action against the holding company.

3. I did not know or discover until on or about March 16, 1998 that the Bank (because a subsidiary) could not sue the 'parent' bank holding company (Peoples Mid-Illinois Corporation).

4. I did not know or discover, until on or about March 16, 1998, the existence of a cause of action against the holding company (Peoples Mid-Illinois Corporation) for replacement of shares of the Capital Stock of the Peoples Bank of Bloomington. 18 C.J.S. Corporations, § 281 [1990].

5. The Stock Holders Ledger pages attached as Exhibit 'B' to the foregoing complaint are copies of Exhibits marked for identification during the pre-trial conference of February 22, 1984 in McLean County 82-CH-124. Said documents were not before the court for its consideration because the Bank's said action was dismissed 'per Stipulation' between the Bank and George F. Dick III."

Prior to plaintiff's March 1998 discovery of the fact that the trustee Bank can not sue its parent holding company, she could not have shown her right to sue on this cause of action. A subsidiary cannot pierce the corporate veil to sue its parent corporation. In re Rehabilitation of Centaur Ins. Co., 238 Ill.App.3d 292, 300, affirmed 158 Ill.2d 166 (1994).

If the trustee can not be subjected to the jurisdiction of the court or if there is no trustee, the beneficiary can maintain a suit in equity against the third person. Restatement (Second) of Trusts, § 282 (3), p. 44 (1959). A court of equity will not permit the wrongdoer to escape liability as a result of the accidental circumstance that the trustee is not available. Comment f., p. 46.

(3)

As set forth in plaintiff's other uncontroverted affidavit (Exhibit "J," App. 52):

> "1. I did not know or discover until doing research, in or about early September 1998, while preparing my Supplement (filed September 11, 1998) to Plaintiff's Opposition, that it was not necessary to the formation and/or existence of a bank holding company (e.g., Peoples Mid-Illinois Corporation) that it have possession of all (100%) of the voting shares of a subsidiary."

The first Illinois Bank Holding Corporations Act pertained to companies doing business in Illinois which directly or indirectly owned, controlled or held "with power to vote 15% or more of the voting shares of each of two or more banks." Ill.Rev.Stat. (1955), Ch. 16½, §65 (c). The Bank Holding Company Act of 1957 was in effect at the time of the aforesaid mid-1972 conversion. Ill.Rev.Stat. (1973) Ch. 16½, §72 (c). It pertained to any bank holding company "which directly or indirectly owns or controls 15 per centum or more of the voting shares of each of two or more banks."

Prior to her said September 1998 discovery that a bank holding company can hold less than 100% of the voting shares of a bank, Helen A. could not have litigated this cause of action for recovery of .076 of such shares.

As set forth in plaintiff's "Conclusions and Prayer for Relief" (at App. 33-34):

> "3. The 2,730 George F. Dick, Jr. shares which were or ought to have been registered to Althea M. Dick as "Life Tenant Under the Will of George F. Dick, Jr., Deceased," after August 1, 1967 and the 1,830 shares Althea M. Dick owned individually after

August 1, 1967 (a total of 4,560 shares) represented .076 of the 60,000 shares of the Capital Stock of the Peoples Bank of Bloomington which were issued and outstanding at the time of Peoples Mid-Illinois Corporation's 1972 conversion of said stock to its own use and beneficial enjoyment."

VI.

Opinions in related cases support plaintiff's affidavits, which show that, prior to March and September 1998, she could not have been heard at a meaningful time and in a meaningful manner as to the cause of action she has pleaded in the instant case.

A.

In Dick v. Peoples Mid-Illinois Corp., 195 Ill.App.3d 654, 658-659 (1990), the trial and appellate courts found that plaintiff was attempting to relitigate the issue of the 1959 transfer of 80 shares to George III. In its order in the instant case (App. 2), the appellate court refers to said opinion as Dick IV. At 657 of said Dick IV, the appellate court referred to Helen A.'s amended complaint filed May 1989, referring in that same paragraph to "38,400 shares of Bank stock." The description "Bank stock" is a misnomer.

A copy of said May 1989 amended complaint is in the record of the instant case as an exhibit (at Tab #18) to defendants' "Memorandum" filed July 16, 1998 (Vol. I, C-89 et seq.). The prayer for relief begins at page 24 of said complaint and begins as follows:

"WHEREFORE Helen A. Dick prays:

A. For an Order finding that there now should be 38,400 additional shares of Peoples Mid-Illinois Corporation stock in the Estate of George F. Dick, Jr., and ordering Peoples Mid-Illinois Corporation to deliver 38,400 shares of

said stock to the Estate of George F. Dick, Jr." Clearly, she did not know (when filing her said 1989 complaint) that a cause of action existed against Peoples Mid-Illinois Corporation for replacement of 4,560 shares of the Capital Stock of the Peoples Bank of Bloomington, such as she has pleaded in the instant case.

B.

In Dick v. Peoples Mid-Illinois Corp., appeal after remand, 242 Ill.App.3d 297, 302 (1993), (referred to within the appellate court's order, in the instant case, as Dick V), the appellate court stated that Helen A. "sought dissolution of the holding company" and that the trial court had held that she had no standing to challenge defendants' banking decisions with regard to forming the holding company.

At 305 of said Dick V, the appellate court stated: "The only [emphasis added] possible set of facts plaintiff has alleged which could state a cause of action revolve around the bank's failure to disclose to her the circumstances surrounding the [1984] settlement agreement and its effect upon her."

Clearly, the only issue decided as to Peoples Mid-Illinois Corporation was that Helen A. did not have standing to challenge its 1971 formation.

In Illinois, the transactional test determines whether an identity exists for purposes of res judicata. "Accordingly, we hold that the same evidence test is not determinative of identity of cause of action." River Park, Inc. v. Highland Park, 184 Ill.2d 290, 310-311 (1998).

The aforesaid 1971 formation of said holding company (described in paragraph 21, at App. 27, of plaintiff's complaint in the instant case) is not the same incident and/or transaction as the mid-1972 conversion of, among other things, these shares of the Capital Stock of the Peoples Bank of Bloomington (i.e., the

conversion set forth in paragraph 23 of said complaint, at App. 27).

At the time of said Dick V, Helen A. certainly did not know that it had not been necessary to the 1971 formation of Peoples Mid-Illinois Corporation that it have possession of all (100%) of the voting shares of a subsidiary and/or that there was a simple remedy and/or legally recognized cause of action against said holding company for replacement of these 4,560 shares (.076) of the Capital Stock of the Peoples Bank of Bloomington (and recovery of dividends declared, with interest) which said holding company had converted, in mid-1972, to its own use and beneficial enjoyment.

Prior to plaintiff's aforesaid March 1998 discovery (affidavit, Exhibit "J," App. 52) that the Bank could not sue its "parent" holding company, she could not have shown that she is entitled to her day in court (e.g., to prevent unjust enrichment) because the trustee Bank can not sue on this cause of action.

C.

In the order sought to be reviewed (App. 2), the appellate court has stated (at App. 8) that the "language" at 305 of Dick V, supports the dismissal of plaintiff's complaint in the instant case. The appellate court has alleged that plaintiff's complaint "attempts to allege a cause of action derived from a violation by Peoples Bank * * *."

The ACTUAL language referred to by the appellate court (Dick V, 242 Ill.App.3d 297, 305 (1993)) reads as follows:

> "The only possible set of facts plaintiff has alleged which could state a cause of action revolve around the bank's failure to disclose to her the circumstances surrounding the settlement agreement and its effect upon her [emphasis added]. As we noted above,

plaintiff is absolutely barred from relitigating this issue."

The actual cause of action plaintiff has pleaded in the instant case is (as described at paragraph 1 of her complaint, App. 22) "against the holding company for replacement of shares of the Capital Stock of the Peoples Bank of Bloomington * * *."

Said shares have been in the possession of a holding company since mid-1972. There is no logical connection between the Bank's 1984 settlement with George III (as to said George III's individual liability) and the cause of action/remedy Helen A. has pleaded in the instant case, to which Peoples Mid-Illinois Corporation and its successor holding company (or companies) are the only defendants.

The only facts plaintiff has pleaded regarding said 1984 settlement are (at App. 29) the following:

> "32. Before any accounting was submitted, the Bank and George III entered a settlement agreement as to George III's (individual) liability and the case was dismissed (over the objection of Helen A. Dick) per stipulation between the Bank and George III on March 14, 1984. Neither of the parties (i.e., the Bank and George III) appealed the orders entered in the Bank's 1982-1984 action."

Said stipulation and order are at App. 72-73. Judge Baner's Record Sheet entry (App. 71) shows, among other things, that the settlement agreement was not before the court for its consideration.

ARGUMENT

Pursuant to Rule 10 (c) of the Supreme Court of the United States, the order of the Illinois appellate court should be reviewed by this Court because the

Illinois court has decided the important federal question of due process in a way that conflicts with the following relevant decisions of this Court.

The Fourteenth Amendment requires an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982).

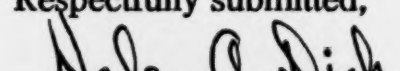
Due process is not a technical conception with a fixed content unrelated to time, place and circumstances. Connecticut v. Doehr, 501 U.S. 1, 10, (1991). Due process is a flexible concept that varies with the particular situation. Zinermon v. Burch, 494 U.S. 113, 127 (1990).

In order to be heard at a meaningful time and in a meaningful manner, Helen A. needed to know matters which her complaint and uncontroverted affidavits show were fraudulently concealed from her by Peoples Mid-Illinois Corporation's agent (the trustee Bank) and which she did not know or discover prior to March and September 1998.

CONCLUSION

For all the foregoing reasons, petitioner prays that a writ of certiorari be granted and that this Court decide the case, in plaintiff's favor, on the merits.

Respectfully submitted,



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